KONG HONG LAI

v.

PP

COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED J
[CRIMINAL APPEAL NO: B-05-125-09]
18 MARCH 2011

CRIMINAL LAW: *Penal Code - Section 376 - Rape - Conviction and sentence - Appeal against - Penetration - Evidence of - Whether there was consent to sexual intercourse - Whether offence of rape committed - Whether there was reason for appellate interference*

The appellant was convicted by the Sessions Court judge on an amended charge of rape under s. 376 Penal Code and sentenced to 16 years from the date of arrest and three strokes of the rattan. On appeal, the High Court judge dismissed his appeal and affirmed the conviction and sentence imposed. The appellant contended that his appeal should be allowed and that he should be acquitted of the charge for the following reasons (i) there was no evidence of penetration; (ii) that the complainant had consented to the sexual intercourse; (iii) there were no seminal stains found on the clothing of the complainant and no swab.

Held (dismissing the appeal)
Per Sulong Matjeraie, Clement Skinner JJCA, Azahar Mohamed J:

(1) The medical evidence herein supported the evidence of penetration in that there were two fresh tears within the last 72 hours to the victim's vagina and the medical report also indicated penetration to the vagina by a blunt object which must have been the appellant's penis. Further, it could not be said that the complainant herein had presumed penetration of her vagina as she was fully able to explain why she said there was penetration and described the motion of the appellant while the act of penetration was occurring. The suggestion of the defence that it was something other than the appellant's penis that had penetrated the complainant's vagina was therefore untenable in the circumstances described by her. (para 2)

A **(2)** The reason given by the appellant to the complainant for taking her to his house was an innocent one *ie*, to switch off the gas cooker in his kitchen. Therefore there was no reason for her to be suspicious which explained her apparent willingness to go to his house. Once she was inside the
B appellant's house it was her evidence that she was under the appellant's control. In the circumstances, it would be wrong to equate her not running away with consent to sexual intercourse given the fact that she had earlier on resisted entering the appellant's house but was dragged into the house
C by the appellant. Further, there were injuries to the complainant as she had sustained two scratch marks when she had resisted going into the appellant's house. (para 2)

(3) The offence of rape was committed when there was
D penetration without consent. Accordingly, the non-finding of seminal stains did not mean there was no penetration without consent. Although there were no seminal stains found, there were other evidences which supported the complainant's story of penetration. Thus, this court agreed with the findings of the
E High Court that there was penetration when the appellant had sexual intercourse with the complainant without her consent. (paras 2 & 4)

(4) There was no reason for appellate interference. No wrong
F principles had been applied in passing the sentence nor was it manifestly excessive in the circumstances of this case. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit oleh Hakim Mahkamah Sesyen atas tuduhan
G pindaan merogol di bawah s. 376 Kanun Keseksaan dan dihukum penjara 16 tahun dari tarikh penangkapan dan tiga pukulan rotan. Atas rayuan, Mahkamah Tinggi telah menolak rayuan perayu dan mengesahkan sabitan dan hukuman yang dikenakan. Perayu berhujah bahawa rayuannya sepatutnya dibenarkan dan beliau
H dibebaskan dari pertuduhan atas alasan-alasan yang berikut (i) tiada keterangan yang menunjukkan penusukan; (ii) bahawa pengadu telah dengan relanya mengadakan hubungan seksual; (iii) tiada kesan seminal ditemui atas pakaian pengadu dan tiada swab.

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Diputuskan (menolak rayuan)
Oleh Sulong Matjeraie, Clement Skinner HHMR, Azahar Mohamed H:

(1) Keterangan perubatan yang terdapat di sini menyokong keterangan penusukan kerana ia mengesahkan bahawa terdapat dua koyakan baru dalam jangkamasa 72 jam terakhir dan laporan perubatan juga menunjukkan penusukan kemaluan dengan benda tumpul yang mana pastinya zakar perayu. Seterusnya, ia tidak boleh dikatakan bahawa pengadu telah membuat anggapan penusukan kemaluannya kerana beliau boleh menerangkan dengan jelas mengapa terdapatnya penusukan dan telah menggambarkan pergerakan perayu semasa tindakan penusukan itu berlaku. Cadangan pihak pembelaan bahawa terdapat sesuatu yang lain daripada zakar perayu yang telah menusuk kemaluan pengadu tidak boleh dipertahankan dari keadaan-keadaan yang digambarkan oleh pengadu.

(2) Alasan perayu kepada pengadu bahawa perayu ingin membawa pengadu ke rumahnya untuk memadamkan gas dapur adalah alasan yang biasa. Oleh itu tiada sebab pengadu patut rasa ragu-ragu untuk memasuki rumah perayu. Sebaik sahaja pengadu berada di dalam rumah perayu ia adalah keterangan pengadu bahawa pengadu berada di bawah kawalan perayu. Dalam keadaan itu, ia adalah salah untuk menyamakan kegagalan pengadu untuk melarikan diri dengan kerelaan untuk mengadakan hubungan seksual mengikut fakta bahawa pengadu sebelum itu telah cuba melawan memasuki rumah perayu tetapi telah diheret oleh perayu.

(3) Kesalahan rogol telah dilakukan apabila terdapat penusukan tanpa kerelaan. Sewajarnya, kegagalan mengesan kesan seminal tidak bermakna tiada penusukan tanpa kerelaan. Walaupun tiada kesan seminal didapati, terdapat beberapa keterangan lain yang menyokong keterangan pengadu mengenai penusukan. Oleh itu, mahkamah ini bersetuju dengan dapatan-dapatan Mahkamah Tinggi bahawa terdapat penusukan apabila perayu mengadakan hubungan seksual dengan pengadu tanpa kerelaannya.

(4) Tiada alasan yang timbul untuk campurtangan rayuan. Tiada prinsip-prinsip salah digunapakai dalam menjatuhkan hukuman dan hukuman tidaklah keterlaluan mengikut keadaan-keadaan di dalam kes ini.

A **Case(s) referred to:**
Nasrul Annuar Abd Samad v. PP [2005] 1 CLJ 193 HC ***(refd)***

Legislation referred to:
Penal Code, s. 376

B *For the appellant - M Edmund; M/s Oh Teik Keng & Partners*
For the respondent - Tetralina Ahmed Fauzi DPP

Reported by Suhainah Wahiduddin

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JUDGMENT

Sulong Matjeraie, Clement Skinner JJCA, Azahar Mohamed J:

[1] The facts of this case are fully set out by the learned judges
D in the courts below. The appellant was convicted by the learned Sessions Court judge on an amended charge of rape under s. 376 Penal Code. He was sentenced to 16 years imprisonment from the date of arrest and three strokes of rattan. On appeal, the learned High Court judge dismissed his appeal and affirmed the conviction
E and sentence imposed.

[2] Before us, the appellant contends that his appeal should be allowed and that he should be acquitted of the charge for the following reasons:

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(1) No evidence of penetration in respect of the incident at 10 o'clock. We do not agree. The complainant's evidence is that she felt a hard object entered her vagina. She also said that when she felt the hard object enter her vagina, both her
G hands were being held by both of the hands of the appellant and both his legs were on top of her legs. She further described that when she felt the hard object going in and out of her vagina, the appellant's body, which was on top of her body, was moving in rhythm with the motion of the hard
H object going in and out. The only reasonable inference to be drawn from the evidence of the complainant and the description given by her of the hard object is that it was the penis of the appellant that had penetrated her vagina and not some other object. The suggestion of the defence that it was

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something other than the appellant's penis that had penetrated the complainant's vagina is therefore untenable in the circumstances described by her. Unlike in the case of *Nasrul Annuar Abd Samad v. PP* [2005] 1 CLJ 193 relied on by the appellant, in the instant case it cannot be said that the complainant here had presumed penetration of her vagina as she was fully able to explain why she said there was penetration and described the motion of the appellant while the act of penetration was occurring. The medical evidence also supports the evidence of penetration in that there were two fresh tears within the last 72 hours from 4 July 2002 to the victim's vagina and the medical report at exh. P38 indicates penetration to the vagina by a blunt object which in this case we find, must have been, the appellant's penis.

(2) On consent

The appellant contended that the complainant had consented to the sexual intercourse at 10am. It was said that there was consent because:

(i) She went to his house willingly;

(ii) She did not raise alarm when she passed through the security gate on the way to his house;

(iii) She did not attempt to escape from the appellant's house when she had the opportunity to do so;

(iv) There were no injuries on the person of the complainant and her clothings were not torn;

(v) It was also contended by the appellant that since he took the complainant to the clinic and waited there for 30 minutes and made no attempt to abscond, it shows that she consented to the sexual intercourse and that his actions were that of an innocent person.

(3) We do not agree for the following reasons:

(i) The reason given by the appellant to the complainant for taking her to his house was an innocent one, ie, to switch off the gas cooker in his kitchen. Therefore there was no reason for her to be suspicious which explains her apparent willingness to go to his house;

A (ii) When she passed the security gates there was no reason for her to raise an alarm as she was not in a situation of danger then;

(iii) Once she was inside the appellant's house it was her
B evidence that she was under the appellant's control and she was too frightened to run away. In the circumstance it would be wrong to equate her not running away with consent to sexual intercourse given the fact that she had earlier on resisted entering the appellant's house but was
C dragged into the house by the appellant.

(iv) As far as injuries are concerned, we find that there were injuries to the complainant. When she resisted going into the appellant's house she sustained two scratch marks as
D confirmed by SP11. With regards to the fact that there does not appear to be any other injuries found on the complainant, it is not her evidence that the appellant had used violence on her and therefore the non finding of other injuries on her does not mean that she had
E consented. With regards to the absence of any tear on her clothing, it was her evidence that her buttons can easily be taken off.

(v) On the point about the appellant not absconding from the clinic, we find that the appellant had sent the complainant
F to the clinic as she had complained of gastric pain and back pain. There was no evidence that the complainant had indicated to the appellant that she was going to complain of what had happened to her. Therefore his not absconding is not indicative of his innocence in the
G circumstances.

(4) No seminal stains found on the clothing of the complainant and no swab.

H (5) In our view the offence of rape is committed when there is penetration without consent. Accordingly the non finding of seminal stains does not mean that there was no penetration without her consent. Although there were no seminal stains found, there was the other evidence we referred to earlier
I which supported the complainant's story of penetration.

[3] Finally, with regards to the submission of the defence that the sexual intercourse which occurred at 11am in the room upstairs is irrelevant to the charge and should not have been introduced, we do not agree. We agree with the learned High Court judge that such evidence formed part of the *res gestae*. That evidence was necessary so as to enable the complainant to give a complete unfolding of the narrative of this incident.

[4] For all the reasons above, we agree with the findings of the trial judge and the High Court judge that there was penetration when the appellant had sexual intercourse with the complainant without her consent.

[5] We affirm the conviction and with regards to the sentence imposed on the appellant we find no reason for appellate interference in that we do not find that wrong principles had been applied in passing the sentence nor was it manifestly excessive in the circumstances of this case. Therefore we affirm the sentence.

[6] For the above reasons we dismiss the appeal.